Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1075

TYRONE GUYTON, a deceased minor, by MATTIE SHEPHERD, Administratrix of the Estate of TYRONE GUYTON, deceased,

Petitioner,

vs.

D. LOWELL JENSEN, CHARLES EDWARD HERBERT, DONALD WHYTE, LAWRENCE HOLMAN, EDWARD HILLIARD, GEORGE T. HART, THOMAS DONAHUE, WALLER PRENTICE, CONRAD BLEVINS, JOHN ROBERT LOTHROP, and JAMES F. DONOVAN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief in Opposition

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OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 606 F.2d 248. No opinion was rendered by the District Court for the Northern District of California.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Can a plaintiff state a claim for which relief can be granted under the Civil Rights Act for alleged actions of public officials which occurred after the death of plaintiff?

STATEMENT OF CASE

Petitioner, a deceased minor, brought an action through the administratrix of his estate by a complaint for damages alleging violation of his civil rights. The complaint alleged that petitioner was shot and killed by three police officers, defendants Dale Phillips, Thomas Mierkey, and William Matthews. The third amended complaint in that action also alleged claims against James F. Donovan and the other respondents to this Petition.

Petitioner has not alleged that James F. Donovan or the other respondents performed any acts or participated in any conspiracy prior to the death of plaintiff. Rather, the complaint alleges that *after* the death of plaintiff, Donovan and the other respondents participated in a conspiracy with the three police officers.

The district court dismissed the action against Donovan and the additional respondents for failure to state a claim upon which relief can be granted. Petitioner's claims against the three police officers, defendants Phillips, Mierkey and Matthews, have not been dismissed and are pending before the district court. In addition to the action pending in the district court, a state court action seeking damages for wrongful death has been filed by the administratrix of the petitioner's estate against the three police officers and their employer, the City of Emeryville, and that action is presently pending in the Superior Court of California, County of Alameda.

Because petitioner seeks review of a dismissal pursuant to Fed. R. Civ. P. 12(b), the facts alleged in the third

amended complaint (Appendix D of Petition) are to be accepted as true for the purpose of any review. However, petitioner has set forth numerous additional allegations of "fact" in his Petition which are not contained in the third amended complaint (the "Statement of the Case" portion of the Petition is longer than the third amended complaint). Those assertions not found in the third amended complaint and not supported by the record, should be disregarded.

REASONS FOR DENYING WRIT

Petitioner has made no attempt to discuss the considerations set forth in Supreme Court Rule 19 and, accordingly, has failed to show "special and important reasons" for granting the writ of certiorari. Because there is neither conflict of decision nor an important question of federal law preesnted by the facts of this case, petitioner has opted for a misstatement of remedies as a reason for granting the writ, stating that "[i]n effect, the Ninth Circuit has held that the Civil Rights Acts were not intended to provide redress where the victim of unlawful and unconstitutional conduct by state officers died as a result of such conduct." (Petition at 14.) In fact, as the third amended complaint makes clear, petitioner has not alleged that his death resulted from conduct of respondents, and his action for redress for his death against those whom he claims to have caused it is still pending in two trial courts.

The considerations enumerated in Rule 19 are not satisfied by this Petition and the writ should not be granted. There is no conflict of decision. Petitioner has cited no case which conflicts with the opinion rendered by the Ninth Circuit in this case. In fact, the issue presented was treated as a novel one by both the district court and the Ninth Circuit Court of Appeals.

Similarly, there is no important question of federal law presented by this case. The issue presented is of isolated significance, of importance only to the parties to this case, and does not affect the general public interest. In fact, the issue presented by this Petition can be said to affect only the respondents and not even petitioner, since the respondents have been dismissed from the underlying action while the petitioner is still prosecuting actions in two forums where he will have an effective remedy if he can prove that an actionable wrong has been done to him. Since resolution of this issue is not of widespread public interest, the writ should not be granted. As stated by Mr. Justice Frankfurter in *Rice v. Sioux City Cemetery,* 349 U.S. 70, 74, 99 L.Ed. 897 (1955), "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants."

In addition, the writ should not be granted because the decision below is clearly correct. While the issue presented by this case is novel—neither counsel nor the lower courts have found another case discussing this precise issue—the novelty of the issue may well stem from the fact that petitioner's position is so clearly wrong that no other litigant has chosen to assert it.

Respondents do not question that a civil rights action survives the death of the plaintiff, so long as a cause of action was in existence at the time of death. *See, e.g., Hall v. Wooten,* 506 F.2d 564, 568-569 (6th Cir. 1974). In California, as in other jurisdictions, a cause of action does not accrue until the party owning it is entitled to begin and

prosecute an action thereon. *U.S. Liability Ins. Co. v. Hardinger-Hayes, Inc.,* 1 Cal.3d 586, 596, 463 P.2d 770 (1970).

While the petitioner's civil rights action against the three police officers for having caused his death has survived and is being prosecuted by his administratrix, petitioner had no cause of action against respondent at the time of his death, since by the very allegations of the third amended complaint, respondent had performed no acts and participated in no conspiracy until after the plaintiff was dead. As correctly noted by the court below, "However, the conspiracy with which the three officers are charged is a conspiracy to deprive [petitioner] of his civil rights; and, inasmuch as [petitioner's] civil rights must terminate with his death, so must any conspiracy to deprive him of those rights." 606 F.2d at 251.

Finally, there is not a compelling need for the writ to be granted because petitioner has adequate remedies in the absence of an action against respondents. Petitioner has two damage actions pending in the lower courts: a civil rights action against the three police officers in the federal trial court and a wrongful death action against the police officers and the City of Emeryville in the state court. Any judgment for damages which he obtains against the police officers must be paid by the City of Emeryville. California Government Code § 825; *MacDonald v. Musick,* 425 F.2d 373 (9th Cir.), cert. denied 400 U.S. 852 (1970); *William v. Horvath,* 16 Cal.3d 834, 548 P.2d 1125 (1976).

CONCLUSION

This is simply not a proper case for review by this Court. The decision is not in conflict with any other decision and presents no important question of federal law. Petitioner has an adequate remedy in the lower courts for the wrongs which he alleges have been done. Petitioner's desire to pursue a vendetta against additional law enforcement officials at the same time that he pursues his damages claims against the three police officers does not merit the attention of this Court. The trial court properly granted the motion of respondents to dismiss and the Court of Appeals correctly affirmed that dismissal. This Court should not disturb those findings and the petition for writ of certiorari should be denied.

DATED: February 4, 1980.

Respectfully submitted,

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Professional Corporation
Attorneys for Respondent
James F. Donovan

Appendix 1

CALIFORNIA GOVERNMENT CODE § 825

If an employee or former employee of a public entity requests the public entity to defend him against any claim or action against him for an injury arising out of an act or omission occurring within the scope of his employment as an employee of the public entity and such request is made in writing not less than 10 days before the day of trial, and the employee or former employee reasonably cooperates in good faith in the defense of the claim or action, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed.

If the public entity conducts the defense of an employee or former employee against any claim or action with his reasonable good faith cooperation, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed; but, where the public entity conducted such defense pursuant to an agreement with the employee or former employee reserving the rights of the public entity not to pay the judgment, compromise or settlement until it is established that the injury arose out of an act or omission occurring within the scope of his employment as an employee of the public entity, the public entity is required to pay the judgment, compromise or settlement only if it established that the injury arose out of an act or omission occurring in the scope of his employment as an employee of the public entity.

Nothing in this section authorizes a public entity to pay such part of a claim or judgment as is for punitive or exemplary damages.